UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEAN DONAGHY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-110-B***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from an anxiety disorder and cerebral palsy, was capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

coverage to remain insured only through December 31, 1997, Finding 1, Record at 18; that the medical evidence established that he had an anxiety disorder and cerebral palsy, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, *id*.; that he lacked the residual functional capacity ("RFC") to lift and carry more than fifteen pounds, perform more than simple routine repetitive tasks, squat, kneel, crawl or bend repetitively, work above shoulder level, walk on uneven surfaces, work in exposure to extreme cold or interact with the general public, co-workers or supervisors on a frequent basis, Finding 5, *id*.; that he was unable to return to past relevant work as a cook, construction laborer, security guard and commercial fisherman, Finding 6, *id*.; that his capacity for the full range of light work was diminished by non-exertional limitations that narrowed the range of work he could perform, Finding 7, *id*.; that, given his age (27), education (limited) and transferability of work skills (none), if he were capable of performing the full range of light work, application of Rule 202.17 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a conclusion that he was not disabled, Findings 8-11, *id*.; that, using the Grid as a framework for decision-making, at all times relevant to the decision the plaintiff had been capable of making a successful vocational adjustment to work existing in significant numbers in the national economy, including work as a file clerk and an assembler, Finding 12, *id*. at 19; and that he therefore had not been under a disability at any time through the date of decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be

supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff complains that neither the administrative law judge's credibility determination, physical RFC finding nor mental RFC finding was supported by substantial evidence. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). I agree that the RFC findings are not supported by substantial evidence and, on that basis, recommend remand.

I. Discussion

Rosado mandates that the record "contain positive evidence in support of the commissioner's [RFC] findings[.]" *Rosado*, 807 F.2d at 294. In this case, the administrative law judge rejected (at least in part) the only physical and mental RFC assessments of record, made by Disability Determination Services ("DDS") non-examining consultants. *See* Record at 16; *see also id.* at 165-72 (physical RFC assessment dated August 8, 2000 by Robert Hayes, D.O.), 173-86 (psychiatric review technique form ("PRTF") dated December 3, 2000 by David R. Houston, Ph.D.), 187-94 (physical RFC assessment dated January 8, 2001 by Lawrence P. Johnson, M.D.). He did so on the basis that those assessments were not wholly consistent with later-acquired material evidence, *id*. at 16, which included progress notes of neurologist Stephanie R. Lash, M.D., and physical-therapy notes pertaining

to the plaintiff's cerebral palsy and a psychological evaluation by neuropsychologist Christine R. Deering, Ph.D., *see, e.g., id*. at 206-12 (report dated March 13, 2001 by Dr. Deering), 215-19 (progress notes of Dr. Lash dated May 1, 2001, August 22, 2001 and October 31, 2001).

The administrative law judge's judgment that the later-acquired evidence eroded the value of the DDS reports was entirely reasonable. However, the Lash and Deering materials, which focused on diagnosis and treatment options, were not RFC assessments. Rather than asking Drs. Lash and Deering, a medical consultant at hearing or the DDS experts to devise new RFC analyses factoring in that later-acquired evidence, the administrative law judge did the job himself. *See id*. at 16-17.

For example, Dr. Deering reported that her testing indicated the plaintiff suffered from (i) low-average intelligence, (ii) severe impairments in the areas of divided attention, concentration, visual motor integration and executive functioning and (iii) impaired personality functioning (of a sort characterological in nature and less amenable to treatment) involving chronic alcohol dependence, dysphoria and anxiety. *Id*. at 211. She further stated that unless the plaintiff received treatment, his ability to work full-time would be jeopardized. *Id*. With this as backdrop, the administrative law judge assessed the plaintiff as having mild restrictions in activities of daily living, moderate difficulties in maintaining social functioning and moderate limitations in maintaining concentration, persistence and pace. *Id*. at 15.[2] He further crystallized the evidence into functional limitations – inability to perform more than simple, routine, repetitive tasks or to interact with the general public, co-workers or supervisors on a frequent basis – that he factored into a hypothetical propounded to a vocational expert at hearing. *Id*. at 16-17, 49-50. He relied on the vocational expert's response (that

[2] As the plaintiff points out, *see* Statement of Errors at 5, the administrative law judge neglected to complete a separate PRTF, although he did discuss PRTF-related findings in the body of his decision, *see* Record at 15. A separate PRTF should be completed on remand.

a person with those restrictions, among others, could perform work as a file clerk or assembler) to meet the commissioner's Step 5 burden. *See id*. at 17, 50.

It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs*., 670 F.2d 374, 375 (1st Cir. 1982). "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions." *Id*.

The administrative law judge may or may not accurately have translated the Deering findings into a mental RFC.[3] As a layperson, I cannot tell whether he did, and as a layperson himself, he was out of his depth in attempting to do so unaided. *See, e.g., Gordils v. Secretary of Health & Human Servs*., 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record"). This was reversible error.

As a result, the case should be remanded for (i) assessment by appropriate experts of the plaintiff's physical and mental RFC based on the totality of the record, both for SSI and SSD purposes and (ii) re-hearing with the assistance of a vocational expert, following which the plaintiff's credibility also would be reassessed.[4]

II. Conclusion

[3] Inasmuch as appears, the administrative law judge chose to credit the Deering report. *See* Record at 15.

[4] The commissioner may choose to reassess RFC prior to re-hearing or to reassess it at re-hearing with the assistance of appropriate experts. On first go-round, the administrative law judge did not find it necessary to distinguish between the plaintiff's status as of his date last insured (December 31, 1997) and through the date of decision. *See* Record at 17-18. Such a distinction may or may not need to be drawn on remand.

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of March, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

DEAN DONAGHY represented by **DAVID A. CHASE**
MACDONALD, CHASE & SZEWCZYK
700 MOUNT HOPE AVENUE
440 EVERGREEN WOODS
BANGOR, ME 04401
942-5558
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

SOCIAL SECURITY ADMINISTRATION represented by **JAMES M. MOORE**
U.S. ATTORNEY'S OFFICE

COMMISSIONER

P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER S. KRYNSKI
SOCIAL SECURITY DISABILITY
OFFICE OF THE GENERAL
COUNSEL
5107 LEESBURG PIKE ROOM 1704
FALLS CHURCH, VA 22041-3255
(703) 305-0183
LEAD ATTORNEY